IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR REVISION NO. 27 OF 2022

(C/F Labour Dispute No. CMA/KLM.MOS/ARB/99/2020)

IDD ABEID NAIBU……..…… APPLICANT

VERSUS

YARA TANZANIA LIMITED…….……..……RESPONDENT

JUDGEMENT

Date of Last Order: 01.11.2023
Date of Judgment:15.02.2024

MONGELLA, J.

The applicant has moved this court vide **section 91(1) (a), (2) (b) and (c) of the Employment and Labour Relations Act, 2004** as amended (ELRA) and **Rule 24 (1); (2), (a), (b), (c) , (d), (e), (f); (3) (a), (b), (c) (d) and; 28 (1), (c), (d) and (e) of the Labour Court Rules, 2007, GN No. 106 of 2007**. He is seeking for this court to examine and revise the award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/KLM/MOS/ARB/99/2020 to satisfy itself on its legality, propriety and correctness and grant any other reliefs or orders it may deem just. The applicant alleges that the award of the arbitrator was improperly procured, unlawful and irrational.

The application was accompanied by the sworn affidavit of the applicant. The respondent disputed this application vide sworn affidavit of one Narindwa Shahidi, her principal officer.

The applicant was employed by the respondent on temporary basis on the 01.11. 2014. His contract of employment was upgraded on permanent terms on the 30.09.2016 as seen in Exhibit Y-1. On 02.07.2020, the applicant was charged for dishonesty and breach of the respondent's code of conduct (Exhibit Y-31) specifically Clause 3: 4, 3: 6, 4:1, 07 and the respondent's sale procedures (Exhibit Y-27). The particulars of the allegations are to the effect that: the applicant was conducting personal fertilizer cash transactions through the respondent's distributors working in his sales territory and he did not declare conflict of interest in handling fertilizer transactions outside of his area of responsibility as an employee of the respondent.

It was alleged that the respondent informed the applicant of the disciplinary hearing on such allegations, but he did not show up leading the matter to be heard in his absence. The outcome of the hearing (Exhibit Y-4) showed that he was guilty. After the outcome was communicated to him, he unsuccessfully filed an appeal against the verdict. Finally, his employment was terminated effectively on 29.07.2020 as seen in his letter of termination (Exhibit Y- 19).

Aggrieved, the applicant filed a claim at the CMA alleging that the termination was both substantively and procedurally unfair. He

claimed the following reliefs; payment of notice in lieu of salary equivalent to T.shs. 4,603,872/=; severance pay equivalent to T.shs. 6,197,520/= and compensation worth 24 months' salary equivalent to T.shs. 110,492,928/=.

On the other hand, the respondent denied the claims averring that the termination was both substantively and procedurally fair. The burden laid on the respondent to prove that the termination was substantively and procedurally fair as per section 37 of the ELRA. In discharging his burden, she called 7 witnesses to prove that the termination was both procedurally and substantively fair. These were; DW1, Narindwa Everest Shaidi, DW2, Jerome Bildard Masaki; DW3, Philipo Mwakipesile; DW4, Swelehe Ramadhani Mkilindi; DW5, Jasmine Massawe; DW6, Hawa Nasa Mhina and DW7, Maureen Kitimisa. 34 exhibits were also tendered and admitted to prove the respondent's case. On the other hand, the applicant fended for himself testifying as PW1.

After hearing both parties, the CMA found that the termination was procedurally and substantively fair and eventually ordered the respondent to transport the applicant to his place of recruitment in Dar es Salaam.

Aggrieved by such decision the applicant has brought this application seeking for this court to revise the impugned award based on six grounds as advanced under paragraph 11 of his affidavit, to wit;

(a) The Honourable Arbitrator erred in law and facts in favour of the respondent since the reasons of termination were not proved by the respondent at the time of hearing.

(b) The Honourable Arbitrator erred in law and facts in favour of the respondent, since the Applicant was not availed with the right to be heard before disciplinary hearing committee.

(c) The Honourable Arbitrator erred in laws and facts in favour of the respondent, since the disciplinary issues were not properly communicated to Applicant.

(d) The Honourable Arbitrator erred in laws and facts in favour of the respondent, on the reason that oral evidences improperly assessed by Arbitrator.

(e) The Honourable Arbitrator erred in laws and facts in favour of the respondent, on the reason that the documentary evidences were improperly assessed by Arbitrator.

(f) The Honourable Arbitrator erred in laws and facts in favour of the respondent, since the award was prematurely concluded.

The application was resolved by written submissions whereby both parties were represented. The applicant was represented by Ms. Zuhura Twalib and the respondent by Mr. Nuhu Mkumbukwa, both learned advocates.

While adopting the applicant's affidavit, on the 1st ground, Ms. Twalib averred that the CMA failed to evaluate the evidence on

record and instead made its award based on an issue of conflict of interest which was never raised by the respondent at the internal hearing processes. She claimed that the said issue which arose from BRELA was never addressed by the respondent at internal hearing. She referred to the suspension letter, notice to attend hearing and termination letter which in her view shows that the applicant was never given an opportunity to be served with the documents and being heard at the internal disciplinary committee. In that respect, he contended that the arbitrator concluded the dispute on reasons raised as an afterthought. She further contended that the internal disciplinary procedures did not indicate whether the respondent's agents were called to the disciplinary hearing to prove the allegations against the applicant because the records showed that the meeting was held *ex-parte* in absence of the applicant and the respondent's agents.

Ms. Twalib further averred that the allegations listed on the notice to attend disciplinary hearing (Exhibit Y 11) were on breach of section 3(4), 3(6), 4(1) of the respondent's Code of Conduct and section 7 of the Sale Procedures. She considered that being different from the letter of termination (Exhibit Y9), which listed reasons for termination to be gross dishonest and breach of the respondent's Code of Conduct. She alleged that the arbitrator and the respondent relied on the Code of Conduct that was never supplied to the applicant at the commencement of his employment. She added that there is no proof that the applicant was aware of the existence of the respondent's Code of Conduct

nor does his contract for employment indicate that the Code of Conduct existed. She made reference to the testimony of DW1 and DW3 on cross examination pertaining to the Code of Conduct being known to the applicant and signed by him. Considering her argument that the Code of Conduct and Sale Procedures were not known to the applicant, she held a view that the same were not applicable to him and that was contrary to Rules 11 (3) and (4), 12 (1) (a), (b) (i), (ii), (iii), (iv) and (v) of the Employment and Labour Relations Act (Code of Good Practice) Rules G.N 42/2007, hence the termination was made for an unfair reason.

She averred that the reasons for the applicant's termination were not proved by the respondent at the hearing as the dispute was between the applicant and the respondent's agent and not the respondent per se. That, the respondent was a 3rd party that just intercepted the dispute and the agents even admitted during hearing that the complaints against the applicant were purely civil matters, but had not instituted any case against the applicant as stated by DW4, DW5 and DW6 during their cross examination.

Ms. Twalib averred further that the respondent failed to take clear steps towards dealing with the allegations against the applicant. She argued so on the ground that most of the documents in the disciplinary process were not signed by the applicant to prove that the same had been served to him. She added that the reasons for termination were also not stated and communicated clearly to the applicant. Referring to the hearing documents, she contended that

the record revealed that the reasons were not proved instead were raised as an afterthought. She supported her arguments with **section 37 (1),(2) (c), (4) and (5) of the ELRA**. She also cited the case of **Stamili M. Emmanuel vs. Omega Nitro (T) Ltd**, Revision No. 213 of 2014 LCCD 2015, Labour Division at Dar es Salaam, averring that the respondent terminated the applicant based on her own whims.

Addressing the 2nd ground, Ms. Twalib averred that the applicant was not availed the opportunity to be heard before the disciplinary hearing committee. She contended that there is no proof on record that the applicant was served with notice to attend the disciplinary hearing (Exhibit Y11) and that even the signed minutes (Exhibit Y13) shows that the hearing proceeded *ex parte*.

She further averred that the main complainants, that is, the respondent's agents, were also absent at the disciplinary hearing. That, it was the respondent's management team that took lead of the meeting. In her view, this shows that the main parties were not involved and instead, the disciplinary hearing was conducted *ex-parte* thereby denying the applicant the right to be heard. Considering such flaws, she concluded that the procedures were not followed as required under **Rule 9 (1) of GN. No. 42 of 2007**. She fortified her argument on the right to be heard with the case of **Humphrey Singogo vs. Mkombozi Commercial Bank PLC** [2023] TZCA 17566 and **Abas Sherally and Another vs. Abdul Fazalboy,** Civil Application No. 33 of 2002 (unreported).

Arguing on the 3rd ground, Ms. Twalib averred that the disciplinary process was not communicated to the applicant. She contended that the respondent created obstacles on the disciplinary process against the applicant by issuing an unlimited suspension leave to the applicant which did not give him the opportunity to come back to proceed with disciplinary hearing. In her view, a limited suspension should have been issued. She also argued that there had not been effective communication to accord the applicant the opportunity to get details pertaining the hearing. That, the applicant handed over tools for communication before commencement of suspension leave including a HP Laptop, mobile phones, airtime and company vehicle as testified by DW1. She added that since the applicant used the respondent's email account prior to suspension, upon shifting to use of personal email after suspension, he faced communication barriers whereby some emails were not replied.

Arguing further, she said that the respondent used phone calls, courier mail (exhibits Y-22, Y-23, Y-24, Y-25 and Y-26) and emails as means of communicating with the applicant for disciplinary procedures. That the applicant was not allowed to access the office rendering the communication un-effective. She made reference to the testimony of DW2 as to difficulties in communication with the applicant. She challenged the courier mail (exhibits Y-22, Y-23, Y-24, Y-25 and Y-26), Exhibit Y-11 and Exhibit Y-13 on the ground that they do not show that the applicant was served or that he attended the disciplinary hearing. Further, she

claimed that the notice of termination and notice in lieu of salary were not served to the applicant which was contrary to **section 41 (1), (b) (i), (3) (a) and (5) of the ELRA.**

Concerning the 4th ground, Ms. Twalib basically reiterated her submissions on the first ground She averred that the applicant was neither availed nor did he sign the respondent's Code of Conduct and the Sale Procedures as found in the oral evidence by the respondent's witnesses.

With respect to the 5th ground, she averred that the arbitrator improperly assessed the documentary evidence presented before the CMA. Specifically referring to Exhibit Y-11, she contended that the same was not signed by the applicant to prove that it had been served to him. With regard to Exhibit Y-13, she argued that the same does not show that the applicant was present in the meeting. As to Exhibit Y-1, she said that the same showed that the applicant was employed at Dar es Salaam but no expatriation fee was awarded. Concerning Exhibit Y-31, she contended that it was not signed by the applicant to show his commitment. As to Exhibit Y-32, she argued that the same was not signed by the applicant to show he was concerned with the orders. On Exhibit Y-11, she contended that it did not clearly show how the applicant's conduct affected the respondent's operations. Lastly, on Exhibit Y-19, she claimed that though the same showed the terminal benefits owed to the applicant, still the arbitrator did not award the benefits.

Ms. Twalib continued to argue that the arbitrator awarded the applicant transport to place of recruitment, but not subsistence for the period between the time of termination to the date of transportation. She further contended that the claims by the respondent's agents were not proved specifically. Pinpointing the specific claims, she contended that NASA KILIMO did not prove her claim of T.shs. 27,687,000/-; MKILINDI AGRIOVET did not prove her claim of T.shs. 24,829,080 and HAPCP AGROBUSINESS did not prove her claim of T.shs. 9,887,000/=. In her view, these alleged claimants ought to have filed a civil case, but did not do so. Instead, the respondent jumped in without having any locus and terminated the applicant unfairly.

Addressing the 6th ground, Ms. Twalib claimed that the award was prematurely concluded. She argued so saying that the arbitrator did not specify the place of recruitment and time limitation in which the respondent was to pay for the applicant's repatriation. Pointing another flaw, she contended that the arbitrator also failed to quantify the transportation allowances which was contrary to **Regulation 16 (3), (4) of the Employment and Labour Relations (General) Rules**, **GN No. 47 of 2017**. She alleged that the quantification on tonnage would have made the transport costs equivalent to 4,500,000/=. She also alleged that the arbitrator failed to award the applicant with subsistence allowance from the date of termination to the date of transportation.

Arguing further, she contended that, while the arbitrator alleged that there was no any proof presented to show that the applicant initiated a handover but no cooperation was given to him; DW1 admitted that the applicant did handover the company's properties. In the premises, she had the stance that the claim of subsistence allowance to the date of transportation were lawful and valid thus ought to have been granted according to **section 43 (1) (a), (b), (c) and (2) of the ELRA.**

As to subsistence expenses, she averred that per **Regulation 16 (1), (2) of GN. 47 of 2017** the same ought to have been calculated for 32 months being the period from the date the applicant was terminated to the date the CMA award was issued multiplied by the applicant's monthly salary, which was equivalent to T.shs. 147,323,904/=. She contended that **section 44 of the ELRA** is clear as to terminal benefits and that the applicant was entitled to; T.shs. 4,603,872.00/= as salary in lieu of notice; T.shs. 4,603,872.00/= as pending salary for July; T.shs.4,603,872.00/= for outstanding 22 leave days; T.shs. 7,437,024/= as severance pay for 6 years; T.shs. 160,000/= as transport fare for 4 persons; T.shs. 4,500,000/= for luggage transportation; T.shs. 147,323,904/= as subsistence expenses; T.shs. 110,492,928 as 24 month's salary being compensation for unfair termination and; a certificate of service. The grant total being T.shs. 283,725,472.00/=.

Ms. Twalib further contended that the quantification of the terminal benefits included those listed in the termination letter (Exhibit Y-19) and any other terminal benefits according to **section 44 of the ELRA**. She finalized her submissions insisting that the applicant's termination was unfair procedurally and substantively and that the CMA award was tainted with irregularities. She thus prayed for the award to be quashed and for this court to grant any orders it deems fit.

Replying to Ms. Twalib's submission, Mr. Mkumbukwa, also started by adopting the contents of the counter affidavit duly sworn by one Narindwa Shaidi, an officer of the respondent. He had a fore stance that the revision is without merit.

Addressing the 1st ground, he averred that the arbitrator correctly found in favour of the respondent as there were valid reasons for the applicant's termination. Referring to Exhibit Y-1 and Y-11, respectively, he submitted that the applicant was employed as a sale agronomist and was charged with gross dishonestly contrary to the respondent's Code of Conduct. Explaining the alleged misconduct, he said that the applicant did not declare his conflict of interest when handling fertilizer transactions outside his area of responsibility and conducted personal fertilizer and cash transactions through respondent's distributors or agents working at his territory (in Moshi). He had the stance that the allegations were proved by DW4, DW5 and DW6.

Analyzing the respondent's evidence at the CMA, he averred that DW4 testified that fertilizers were being ordered from the respondent and the orders, pay slips and truck details were then sent to the applicant who was the service provider on behalf of the respondent. That, the applicant frequently took fertilizers from him valued at T.shs. 24 million, but only paid T.shs.13 million. That, the applicant was reluctant to pay the rest which is why he wrote a complaint letter to the applicant's boss, one Philipo. The letter was admitted as Exhibit Y-29. Mr. Mkumbukwa contended further that the applicant never cross examined DW4 on his averment regarding taking of fertilizers amounting to T.shs. 24 million and only paying T.shs. 13 million. He considered that amounting to admission of the assertion, a fact he backed with the case of **Kilanya General Suppliers Ltd & Another vs. CRDB Bank Ltd & Others** (Civil Appeal 1 of 2018) [2021] TZCA 3529 TANZLII.

He submitted further that DW5 testified that the respondent supplied her fertilizers and that he used to send the applicant orders and truck details to send the same to the respondent's headquarters, then fertilizers were delivered to her. He said that DW5 further testified that upon taking fertilizers from her, the applicant paid her vide a check which was dis-honoured by the bank. That upon informing the applicant on the incidence, he promised to write her another cheque, but the same was not done. Thus, he owed her T.shs.9 million. That, after continued follow up, she wrote a complaint letter to his boss. This was admitted as Exhibit Y-30. Mr. Mkumbukwa added that such details were not cross

examined by the applicant and thus, accepted in the light of **Kilanya General Supplies** (supra).

He continued to submit that DW6 also stated that she sent the applicant orders and truck details to forward to the respondent and that sometimes she placed orders via: LPO No. 0178 worth T.shs. 11,685,000/=; LPO No. 0182 worth T.shs. 12,390,000/= and; LPO No. 0187 worth T.shs. 10,230,000/=. That DW6 said that the orders were not delivered to her as evidenced in Exhibit Y-32. That, DW6 also inquired from the applicant who alleged that the fertilizers were taken by him and he would pay her money, but failed to pay in full rendering an outstanding amount of T.shs. 27 million. That, DW6 also submitted a cheque issued to her by Agri Tanzania Limited (Exhibit Y-33), but signed by the applicant who told her it was his company. However, the cheque bounced as the company had no money. That, DW6 also testified to have communicated to the applicant as evident in Exhibit Y-34 whereby he promised to deliver her fertilizer named Amidas instead of issuing payment, but the same was not done.

Mr. Mkumbukwa contended that the applicant did not cross examine DW6 on not delivering the fertilizer she had ordered through him and instead delivering to himself. That, he did not challenge the T.shs. 27 million he owed her and his texts to her that he would deliver Amidas fertilizer instead of paying back the money or that the cheque was signed by him and was from Agri Tanzania Limited, his company and that the same bounced as the account

was empty. He maintained his stance that failure to cross examine rendered the facts admitted. He again referred the case of **Kilanya General supplies** (supra).

As to further proof of the gross dishonest by privately engaging in similar business with his employer thereby occasioning conflict of interest; Mr. Mkumbukwa averred that DW7 testified that a company named Agri Relief Tanzania was incorporated on 19.06.2021. That, the applicant was a shareholder and director in that company as appearing in the signed MEMART (Exhibit Y-36). That, the said company deals with sale of fertilizers. He still challenged the applicant for not cross examining DW7 on such facts.

Mr. Mkumbukwa continued his submission referring to the testimony of DW3. He stated that DW3 testified that all sale agronomists were given sales delivery and procedures (Exhibit Y-27), which govern the sale of fertilizer. That, DW3 confirmed that he received complaints from one Nasa Kilimo, Ramadhani Swalehe and DW5 who claimed to have sold fertilizers to the applicant, but he did not pay for the same. In his view, DW4 up to DW7 proved that the applicant committed gross dishonest by not declaring conflict of interest and therein handling fertilizer transactions privately while the respondent, his employer, engaged in the same business. He had the stance that the case against the applicant was well proved in balance of probabilities. He cited the case of **Public Service Social Security Fund vs. Siriel Mchemba** (Civil Appeal 126 of 2018) [2022]

TZCA 284 and **Metropolitan Tanzania Insurance Ltd vs. Eliameshinda William Kyungai** (Revs Appl No. 192 of 2022) [2022] TZHCLD 937 (Both from TANZLII) to support his stance.

Mr. Mkumbukwa contended further that the applicant's reasons for termination were proved. That, the question of conflict of interest was stated in the notice to attend disciplinary hearing (Exhibit Y-11). He added that the fact that DW4, DW5 and DW6 chose not to take legal action did not preclude the respondent from taking disciplinary action against the applicant after receiving complaints on the applicant conducting business with his employer's distributors. He added that as testified by DW3, the applicant was aware of the Code of Conduct as the same was normally shared via email.

Replying to the 2nd ground, as to the right to be heard, he contended that the ground posed a new issue not included in CMA Form No. 1. In that respect, he argued that the same should not have been raised at this point. He cemented his argument with the case of **Kisanga Tumainiel vs. Frank Pieper & Another** (Civil Appeal Case 139 of 2008) [2016] TZCA 735 TANZLII. In the alternative, he argued that the applicant was accorded the right to be heard prior to his termination by the respondent. That, the same was vide a disciplinary hearing held here in Moshi prior, which he was served with notice (Exhibit Y-11). That, the notice contained details of the allegations leveled against him and was served to him via email as proved by Exhibit Y-12.

Mr. Mkumbukwa averred further that email correspondence was official means of communication and the applicant, like other employees was given a laptop and a smartphone with monthly airtime of Tsh.150,000/- and such fact was not cross examined by the applicant. He added that the applicant was emailed regarding the disciplinary hearing and was served via Skynet Courier by DW2 as seen in Exhibits Y-22, Y-23, Y-24, Y-25 and Y-26, but just chose not to attend the same, hence the respondent was prompted to proceed in his absence. He argued that proceeding in absentia under the circumstances is allowed under **Rule 13(6) of GN. 42 of 2007**. To put more emphasis on his point, he referred the case of **Kiboberry Limited vs. John van der Voort** (Civil Appeal 248 of 2021) 2022 TZCA 620 TANZLII. Citing further the case of **MT. 59505 SGT. Aziz Athman Yusuf vs. Republic**, Criminal Appeal No. 324 of 2019, he averred that the applicant squandered his right to be heard.

In that respect, he challenged the case of **Humphrey Singogo vs. Mkombozi Commercial Bank PLC** (supra, cited by the applicant) on the ground that the same was inapplicable in this case as the applicant was availed the right to be heard, but did not utilize it.

Reacting on the 3rd ground, Mr. Mkumbukwa also found the ground to be staging a new issue not raised at the CMA. He termed it an afterthought. Arguing further, he averred that CMA Form 1 is recognized as a pleading as was the case in **Bosco Stephen vs. Ng'amba Secondary School** (Revision 38 of 2017) [2020] TZHC 390 TANZLII. That, the CMA is banned from entertaining matters not

formally placed before it. He maintained that a party cannot take up a new plea or contention on appeal, unless pleaded or framed as an issue. He supported such stance with the case of **Kisanga Tumainiel vs. Frank Pieper & Another** (supra).

Alternatively, without prejudice, he averred that there is no requirement under the law for the disciplinary issues to be communicated to the applicant what is required is for the employer to communicate the allegations and decisions or outcome of the hearing, a stance he supported with **Rule 13 (2) and (8) of GN. 42 of 2007**.

Mr. Mkumbubwa jointly submitted on the 4th and 5th grounds. He supported the arbitrator's decision arguing that the arbitrator properly analyzed both oral and documentary evidence before her. Referring to pages 2 to 25 of the award, he argued that the arbitrator summarized the evidence and analyzed both oral and documentary evidence. He had further contention that although this court, being the first appellate court, is endowed with the power to re-evaluate the evidence of the CMA, still, prior to exercising this duty, it ought to note that the CMA had the advantage of observing the witnesses as they gave their evidence. In his view, this is not a fit case for this court to exercise such powers. In support of his stance, he cited the case of **Khalife Mohamed vs. Azuz Khalife and Another,** Civil Appeal No. 97 of 2018, in which the case of **Peters vs. Sunday Post** [1958] EA 424 was cited therein.

He further contended that Ms. Twalib introduced other grounds itemized from (i) to (ix) in her submission which did not feature in the pleading. He considered such submission amounting to submission from the bar, which cannot be acted upon. He supported that stance with the case of **Tina & Co. Ltd & Others vs. Eurafrican Bank T. Ltd** (Commercial Review No. 7 of 2018) [2019] TZCA 120.

As to the 6th ground, Mr. Mkumbukwa averred that the award was delivered according to the requirement of **section 88 (11) of the ELRA**. That, the same was issued on 17.03.2023 but there was an explanation offered on the alleged delay as found in the award. He further alleged that the same cannot be a reason enough for invalidation of the award. He referred the case of **Fairmont Resort Company Ltd vs. Adam Juma Mohamed and 2 Others** (Rev. Appl. No. 603 of 2019) [2021] TZHCLD 490 to bolster his point. He finalized his submission by praying that the application be dismissed for want of merit.

Rejoining, Ms. Twalib averred that while the applicant was terminated for dishonesty and breaching the respondent's Code of Conduct and Sale Procedures, he was not bound by the said Code of Conduct and Sale Procedures. She reiterated that the rules of conduct were not made available to the applicant in a manner easily understood, were not clear and were ambiguous to the applicant. That, in the circumstances, the applicant was not expected to be aware of them nor were they consistently applied by the applicant. She thus had the stance that termination was not

an appropriate sanction for contravening the rules. Arguing further, the contended that the respondent failed to convince the court on the existence of the rules or standards regulating conduct of employees that justified termination of the applicant. That, the Code of Conduct was not proved to have been signed by the applicant prior to commencing his employment with the respondent.

He averred that the law under **Rule 12 of GN No. 42 of 2007** requires an employer, arbitrator or judge to decide if the termination is fair regarding the rules of Conduct or standards of contract and not otherwise.

She contended that the 2nd ground was on procedural aspects and the right to be heard as enshrined under rule **13 of GN No. 42 of 2007.** That, the applicant was denied the right to be heard as the respondent created obstacles in communication whereby, he had the applicant handover all official communication tools on suspension. She referred the testimony of DW1 arguing that the respondent admitted such facts. She added that emails were sent to the applicant while the applicant's mode of communication was cut off by the respondent as all tools had been handed over to the respondent rendering it hard for the applicant to access any information. That, the applicant only received some emails vide his private email account which was not used often. That, Exhibit Y-14 and Exhibit Y-19 were some of the documents that he received.

Ms. Twalib further argued that the arbitrator failed to assess the position of the applicant in the sense that his responsibilities were to connect DW4, DW5 and DW6 with the respondent's fertilizer customers and that all text messages submitted as evidence were part of normal communication and were part of his daily duties. As to the award being premature, she held the view that the same failed to meet legal requirements and ended up with legal conclusions deviating from relevant facts of the dispute.

She added that an arbitrator or judge has discretion to determine a dispute and reliefs not pleaded in CMA Form No. 1 if it is the requirement of the law. She reiterated her prayer for this court to set aside the award of the CMA and grant any relief it deems fit for justice.

I have considered the submissions of both parties and observed the CMA record. Having observed the arguments by the learned counsels for both parties, I am of the opinion that the grounds raised by the applicant cut across three main issues: **one**, whether the applicant was terminated for a valid reason; **two**, whether procedures for termination were observed and; **three**, what reliefs was the applicant entitled to.

Prior to addressing the grounds of appeal, I think it is well within my duty to address Mr. Mkumbukwa's erroneous view that this court, being the first appellate court, while endowed with the power to re-evaluate evidence, such powers are limited. That, this court

ought to avoid implementing such duty because it has not heard the testimony of the witnesses directly. While it is true that being the first appellate court it does not have the advantage as that of the trial court or tribunal which heard the witnesses directly and thus had the opportunity to observe their demeanor; still the 1st appellate court has the advantage of going through the records to assess the evidence therein. In the case of **Khalife Mohamed vs. Aziz Khalife and Another** (supra), the Court of Appeal cited the case of **Peters vs. Sunday Post** [1958] E.A 424 at 429 whereby the defunct Court of Appeal held:

> "An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon this Court acts in such an appeal are well settled. **Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.** In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the evidence in the case generally." [Emphasis added]

The Apex Court thereafter stated:

> "As per the above authority, there is no doubt that the assessment of credibility of witnesses as far as demeanor is concerned is the monopoly of the trial court. However, as the first appellate Court we can as well look into the consistency of witnesses in their testimonies and make our own findings."

It is thus clear that being the first appellate court, this court has a duty within such limits to re-evaluate the evidence on record and the power to make its own findings as well. See also, **Siza Patrice vs Republic**, Criminal Appeal No. 19 of 2010 (CAT, unreported); **Registered Trustees of Joy in The Harvest vs Hamza K. Sungura** (Civil Appeal 149 of 2017) [2021] TZCA 139 TANZLII; and **Michael s/o Joseph vs. Republic** (Criminal Appeal 506 of 2016) 2019 TZCA 475 TANZLII.

Now back to the issues to be determined in this case. The 1st issue seems to cut across the 1st, 4th and, 5th grounds. As drawn from the evidence on record, the charges against the applicant appears to emanate from transactions he was personally involved in with the respondent's agents or rather distributors. It appears that the respondent engages in a somewhat farming business in which, among other products, she supplies fertilizers. The applicant was a sale agronomist and the link between the distributors or agents and the respondent company. According to the respondent's Sale and

Delivery Procedures (Exhibit Y-27), he was involved with receiving orders from the distributors and sharing them with the respondent company. Upon the orders being processed, he would communicate truck details or transport details to the respondent and such orders were then received by the respective distributors. That means, among other things, the applicant's duty was to connect the respondent to potential buyers who were, according to the Sale Procedures, required to possess certain qualities.

The problem seems to be that, sometime in 2018 allegedly, as testified by DW4, DW5 and DW6, the applicant engaged in separate dealings with the respective distributors who made orders on his behalf. While it stands unknown as to where exactly the said fertilizers were delivered, the witnesses, including those agents that aired their complaints were sure that they were trading with the applicant separately. It seems at a certain point the applicant was unable to pay the agents for fertilizers he had taken from them. Seemingly, some were issued checks that were dishonoured and that is where the conflict arose. The agents sent complaint letters to DW3, (Exhibit Y-28, Exhibit Y-30 and Exhibit Y-29) pertaining the pending payments for the purchase of fertilizers.

It was shown that the applicant had separate business as the one run by the respondent that was not reported to the respondent. In the premises, I am of the considered view that there was conflict of interest contrary to the applicant's argument. The disciplinary issues did not arise merely from the failure of the applicant to pay the

respective agents, but rather the breach of the respondents Code of Conduct.

Regarding the breach, his counsel argued that he was unaware of the existence of the Code of Conduct and he had not signed the same, hence could not be bound by it. However, in his contract of employment, Exhibit Y-1, there are multiple areas in which reference has been made to various separate documents. For example, at page 2 Clause 4.2, reference is made to job description made under a separate document; at page 5 clause 13 there are details as to severance pay whereby it is stated that severance pay will not be awarded to an employee whose contract is terminated for misconduct and; on the same page at clause 14 there are other references made to other terms and conditions forming part the contract, as annexures.

In that regard, as testified by DW1 and DW3, the respondent's employees are expected to be aware of the terms and conditions binding them which were also shared to them, including the Code of Conduct (Exhibit Y-31). Further, the applicant had been employed for six years and his duties, as testified by the DW3, were provided in the Sale and Delivery Procedures (Exhibit Y- 27), which governs the transactions between the respondent and her distributors with whom the applicant transacted on behalf of the respondent.

Under **Rule 12 (1)(a) and (b) of GN 42 of2007**, there are factors that should be considered in determining whether the termination was substantively fair. The provision states:

> "12 (1) Any employer, arbitrator or judge who is required to decide as to whether termination for misconduct is unfair shall consider-
> (a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment;
> (b) If the rule or standard was contravened, whether or not-
> (i) It is reasonable;
> (ii) It is clear and unambiguous;
> (iii) The employee was aware of it, or could reasonably be expected to have been aware of it;
> (iv) It has been consistently applied by the employer; and
> (v)Termination is an appropriate sanction for contravening it."*

From Exhibit Y-31, the Code of Conduct, under Clause 3.2 it is provided that the Code of Conduct applies to all employees of the respondent. Clause 3.1 provides that the Code of Conduct is published on annual basis. The current one, which was presented in the CMA by the respondent was valid from the 01.01.2019 onwards. Clause 3.3 provides for non-tolerance principle on

violations of the Code of Conduct and respondent's policies and procedures. It also provides that such violations could result to disciplinary actions including termination of employment. Clause 7 provides for conflict of interest whereby employees are warned against having an interest that interferes or appears to interfere with the respondent's interest.

From the foregoing, I hold the view that the applicant was aware of the existence of the Code of Conduct as reference to it was made in the contract of employment and it governed his daily duties. I also hold the view that the applicant's act of transacting in disguise and involving the respondent's agents in the process without disclosing such business to the respondent qualifies to show that there was a conflict of interest and the applicant was aware of the same. If at all there had been an honest business between the applicant and the respective agents, then it would have been disclosed as required by the Code of Conduct. In the premises, I find that the applicant was fairly terminated for breach of the respondent's Code of Conduct. It is immaterial whether the issue between the agents could be resolved by mere payment of the money as claimed by the applicant's counsel. This is because the dispute between the parties is not a civil claim. I t is a labour claim against the applicant for breach of Code of Conduct and the Sale and Delivery Procedures.

The burden of proof in labour matters is on balance of probabilities. See; **Public Service Social Security Fund vs. Siriel Mchemba** (supra); **Paschal Bandiho vs. Arusha Urban Water Supply & Sewerage Authority (AUWSA**) (Civil Appeal 4 of 2020) [2022] TZCA 42 TANZLII**.** In the later, the Court of Appeal stated:

> "As to the standard of proof, rule 9 (3) and (5) of the Code of Good Practice requires an employer to prove, on balance of probabilities, that the reason was not only fair but sufficiently serious to justify termination."

On balance of probabilities, the court weighs the evidence of both parties and the party with heavier evidence ought to win. In this case, the respondent did not only prove the existence of a Code of Conduct which the applicant ought to have observed, but also that the same was clearly known and well reasonably expected to be known by the applicant who was employed by the respondent company for 6 years. The Code of Conduct was applied and the applicant breached the same. On the other hand, the applicant failed to present evidence to discredit the evidence of the respondent on such facts. Further, the applicant never denied categorically, having transacted privately with the respondent's agents. The respondent's evidence thus held more weight than that of the applicant rendering the applicant terminated for a valid reason.

The 2nd issue cuts across the 2nd and 3rd grounds whereby Ms. Twalib challenged that the procedures for termination were not followed. The basis of her challenge is the complaint that the applicant was denied the right to be heard and that there was proper communication of the disciplinary issues to him. I have observed the CMA record and it appears that the applicant alleged of being denied the right to be heard. However, it is clear on record that the applicant was served with three separate inquiries, that is: Exhibit Y-2, Exhibit Y-3 and Exhibit Y-4 requiring him to answer allegations against him. He filed his reply via Exhibit Y-5 in which he addressed claims on Exhibit Y- 3 alone. He did not reply to any of the other claims.

Ms. Twalib contended that there was no any communication on the disciplinary hearing. However, the record shows that the applicant was informed of the disciplinary hearing on multiple instances. In fact, he was emailed after courier service by name of Skynet was procured to serve him physically the notice on disciplinary hearing (Exhibit Y-11). The same also involved the charges levelled against him as well as the time, date and place the meeting was to be held. As testified by DW2, the applicant always refused service alleging that he was out of town and could not receive the served documents.

Contrary to Ms. Twalib's claim that the applicant had no control over his official mail registered with the respondent, it was via official email that communication on disciplinary actions was made to the

applicant. It was in the said notice, as well as, a call by DW3 that he was informed of the disciplinary hearing on all allegations. According to the email sent by DW1 (Exhibit Y-12), it seems that he contacted an advocate, one Jacob Merinyo who followed up on the matter, but was not allowed to be involved in the proceedings given that the company policy does not allow disciplinary hearing to be attended by an advocate, but rather a fellow employee could accompany the applicant. It was also the same e-mail that was used to communicate the minutes and outcome of the disciplinary hearing that he was able to appeal against the decision under which he claimed he was denied the right to be heard as he was not served the notice. This shows that he could access his office email.

It is unclear as to which point the applicant used his personal e-mail because all emails, as referred from relevant exhibits presented before the court, seem to be addressed to his work email address, which he used in any case as he himself admitted. In addition, DW3 made an effort to call the applicant to inform him on several disciplinary procedures being held including informing him of the same disciplinary hearing which he alleged the communication was not clear. He also testified, as seen at page 65 of the typed proceedings, that he was informed on parcels addressed to him and he knew that they were from the respondent. He stated:

"Nilikuwa napata taarifa nyingi sana kupitia courier. Courier alikuwa ananipigia simu kunijulisha ana mzigo wangu na kama nilikuwa sipo nilikuwa namwambia apeleke godown. Ni kweli kuhusu nyaraka hizi alinipigia simu nikamwambia sipo apeleke godown. Alisema atakaa nazo mpaka nirudi ila hakunipa."

He again admitted the same during cross examination, on page 70, that he was indeed called by a Courier agent on the several parcels. He stated;

" Swali; Ulimwambia courier upo wapi?

Jibu: Mng'ano Tanga

Swali: Ulimwambia apeleke wapi?

Jibu: Ofisini godown akasema Hapana atabaki nayo.

Swali: Ulimuuliza courier document zinatoka wapi?

Jibu: Sikumuuliza alisema tayari zinatoka YARA.

Swali: Ulifanya initiative gani kujua ni nyaraka gani hizo?

Jibu: Sikufanya."

Strangely, the applicant never cross examined DW2, the courier service agent that was assigned to serve the respective documents, on him retaining possession of the documents he was allegedly required to serve him. This indicates he accepted the testimony of DW2 as being true. Further, Exhibit Y- 22 shows that the courier service was used and relates to an e-mail written by DW1 (Exhibit Y-12) in which the applicant was informed of his notice to attend the meeting being sent via the said courier service. Exhibit Y- 23 relates

to Exhibit Y-10, an email sent by DW1 informing the applicant on his suspension. It is thus clear that the applicant knowingly missed the disciplinary hearing as he received the emails and knew of the parcels being sent to him from his employer.

The law allows, where it appears that a party has refused to attend disciplinary hearing after being satisfied that he was duly served, the Commission to proceed in such party's absence. This is not a violation of the right to be heard. An omission of one party to exercise his right to be heard, is the other party's right to proceed in his or her absence, unless there are lawful causes on such absence. It is the intention of courts and tribunals that matters come to an end. In that respect, I am of the view that even for the respondent it was imminent that the dispute comes to an end and since the applicant was duly served but intentionally refused to access his right.

The option to proceed in absence of the party who chose not enter appearance is well provided under **Rule 13 (6) of GN 42 of 2007** which states:

> "Where an employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee."

In **Kiboberry Limited vs. John van der Voort** (supra) the Court of Appeal, addressing the interpretation of the above cited provision stated:

> "The above stipulation is couched in permissive terms. It gives the employer two options where the employee unreasonably refuses to attend the hearing after being duly served with the notice. The first option is proceeding with the disciplinary hearing in the absence of the employee with the evidence substantiating the charges against the employee being presented and a verdict reached. The second possibility is to adjourn the hearing."

The respondent did hold the hearing, called witnesses, produced an outcome and shared both the minutes of the said hearing and outcome with the applicant. In the foregoing I find the termination was also procedurally fair.

The 3rd ground relates as well to the 6th ground in which the applicant averred that the award was premature because the CMA awarded relief of repartition without specifying the subsistence allowance owed to the applicant. He as well claimed for severance pay. Following his termination, the applicant is entitled to reliefs listed under **Section 44 of ELRA** which states:

"44.-(1) On termination of employment, an employer shall pay an employee;

(a) any remuneration for work done before the termination;

(b) any annual leave pay due to an employee under section 31 for leave that the employee has not taken;

(c) any annual leave pay accrued during any incomplete leave cycle determined in accordance with section 31 (1);

(d) any notice pay due under section 41(5); and

(e) any severance pay due under section 42;

(f) any transport allowance that may be due under section 43.

(2) On termination, the employer shall issue to an employee a prescribed certificate of service."

Such benefits, are subject to relevant provisions and conditions therein listed. In this case, pursuant to the terms of employment as depicted under Exhibit Y-1, Clause13, which I will read together with **section 42 (3) (a) of the ELRA**; the applicant being fairly terminated both procedurally and substantively is not entitled to severance pay.

The applicant claimed that he was entitled to be paid subsistence allowance for the period from the date of termination to the date of the award since the respondents did not repatriate him to the place of recruitment, which is Dar es Salaam. Under **section 43 (1) (c), of the ELRA**, the applicant is entitled to subsistence allowance on daily basis calculated basing on the monthly basic salary from the date of termination to the date of repatriation. See: **AG & Others vs. Eliji Edward Massawe**, Civil Appeal No. 86 of 2002 in which the Court of Appeal held that "*the employee is entitled to monthly salaries to cover subsistence allowance*." The exact amount to be paid however is calculated in terms of daily wage as per **Regulation 16 (1) of the Employment and Labour Relations (General) Regulation, GN No. 47 of 2017**. See also, **Juma Akida Seuchago vs. SBC Tanzania Ltd.** (Civil Appeal No. 7 of 2019) [2020] TZCA 319 TANZLII.

Since it is unknown to the court as to whether and when the applicant was repatriated, this court is unable to specify the exact amount to be paid to the applicant. Under the circumstances, the respondent shall have to make necessary calculations to determine the exact amount in accordance with the dictates of the law as stated herein. The payment of subsistence allowance shall however be subject to deductions on the salary already advanced to the applicant that remained unpaid at the time of termination of his employment as shown in the termination letter and not disputed by him.

The applicant is also entitled to repatriation costs to Dar es Salaam calculated in terms of **Regulation 16 (3), (4) of the Employment and Labour Relations (General) Rules**, **GN No. 47 of 2017**. The respondent is hereby ordered to effect payment of the subsistence and repatriation allowance to the applicant within 60 days from the date of this decision.

In the foregoing the application succeeds to the extent stated herein, that is, with respect to payment of subsistence and repatriation costs. The rest of the claims are found without merit thus dismissed. Being a labour matter, parties shall bear their own costs of the case.

Dated and delivered at Moshi on this 15th day of February, 2024.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA